

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL ORRIN BAKER

Plaintiff,

VS.

UNITED STATES OF AMERICA,

Defendants.

FILED

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CLERK
U.S. DISTRICT COURT

CA. No. 05-147 Erie

DISTRICT JUDGE MCLAUGHLIN

MAGISTRATE JUDGE BAXTER

PLAINTIFF'S OBJECTION TO THE MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION

NOW COMES, the Plaintiff DARRYL ORRIN BAKER, (hereinafter "PLAINTIFF") and proceeding pro-se, and respectfully moves this Honorable Court to GRANT all the claims submitted in the Plaintiff's First and Second Amended Complaint, and Plaintiff Opposition to the Defendant's Motion to Dismiss Plaintiff's Complaint, or in the Alternative, for Summary Judgment, and Plaintiff's Opposition to United States Government Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. The Plaintiff objects to the Magistrate Judge's Report and Recommendation because the Magistrate Judge has overlooked and misapprehended the material facts in this case, and for the reasons that follow:

OBJECTION (1)

The Magistrate Judge request that this Honorable Court grant the United States of America, et.al. (COLLECTIVELY "THE DEFENDANTS"),

Motions for Summary Judgment as to the Plaintiff's Retaliation Claim. The Magistrate Recommendation at 1 states:

the motion to dismiss as the retaliation claim should be granted as this Court lacks subject matter jurisdiction over this claim

The Magistrate Judges Report and Recommendation at 6 and D states that the:

the Federal Tort Claims Act (FTCA) specifically requires an initial presentation of claim to the appropriate federal agency and a final denial by the agency as a non-waivable prerequisite to filing of the law suit.

The Plaintiff is aware of the Statutory Standards of 28 U.S.C. §2675(a) and the record show that the Plaintiff exhausted and was retaliated against "after" the Plaintiff filed his Administrative Tort Claim 95 Form to the Regional office. The Plaintiff filed in his First and Second Amended Complaint that the Plaintiff was retaliated against for filing grievance in violation of the Plaintiff First Amendment Rights, to exercise a constitutional right. The record show that the Plaintiff Administrative Tort Claim was received on June 17, 2004, and immediately after the record show that the Plaintiff was transferred to Elkton. See (attachment 1). The record show that the Plaintiff was unable to exhaust a Administrative claim at McKean because the Plaintiff was transferred as a result.

The record show that the Plaintiff was also retaliated against when the Plaintiff commenced this law suit against the government officials and placed in administrative detention at Elkton and bogus information reports by the Staff members at Elkton and Mckean. See the Plaintiff's First and Second Amended Complaint.

OBJECTION (2)

The Magistrate's Judge's Report and Recommendation at 1 and number 2 states:

the motion to dismiss should be granted as to Defendant's FCI-Mckean Warden, Officer Wesemen, and the Medical Department as they are improper parties under the FTCA.

Also, at 7 and E SOVEREIGN IMMUNITY

all action brought to the FTCA must be brought against the United States of America and not in the name of the allegedly agency, entity or employee, 28 U.S.C. §§ 2671-2680; 28 U.S.C. § 1346(b). Therefore, FCI-Mckean, Warden, Officer Wesemen and the Medical Department should be dismissed from this action as the only proper party to an FTCA action is the United States of America.

It seems that the Magistrate Judge request ~~that~~ this Honorable Court

grant the Defendant's United States of America motion to dismiss because the Plaintiff did not name the United States of America in the caption when the Plaintiff filed his first and Second Amended Complaint. The Plaintiff acknowledge that Congress specifically set the statutory standard pursuant to 28 U.S.C. § 1346 that sovereign immunity can be waived. See also 28 U.S.C. § 1346(b) 2674, 2679. If this Honorable Court agrees with the Magistrate Judge and United State of America, the Plaintiff will show by the United States involking the discretionary function exception that a non-discretionary act has been committed by the government officials. 28 U.S.C. § 2680 relates to claims based upon the excercise or performance or the failure to excercise or perfrom a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused. 28 U.S.C. § 2680(a). The Plaintiff will show that a material fact exist and that the government emplyee's acts are non-discretionary. See Plaintiff's First and Second Amended Complaint, and also, Plaintiff's Opposition to the Defendant's Motion to Dismiss Plaintiff's Complaint, or in the Alternative, for Summary Judgment Plaintiff's Opplostion to United States Government Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment.

In Powers v. United States 996 F.2d 1121 911th Cir.1993); the Eleventh Circuit stated: we begin with this general priciples; the United States cannot be sued. See Dalehite v. United States, 346

U.S. 1530, 73 S.Ct. 956, 965, 97 L.Ed. 1427 (1953)). Congress through the provisions of the Federal Tort Claims Act has authorized suit against the United States :

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346(b) (West 1976). However, Congress has specifically excepted from the FTCA's limited waiver of sovereign immunity "[a]ny claim...based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C.A. § 2680(a) (West 1965). In Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), the Supreme Court undertook for the first time to describe the contours of this discretionary function exception to the FTCA. the Court noted that Congress intended to protect the "the discretion of the executive or the administrator to act according to one's judgment of the best course. Id. at 34 73 S.Ct. at 967. While declining to define precisely where discretion begins and ends. The Court stated:

"where there is room for policy judgment and decision there is discretion." Id. at 36 73 C.Ct. at 968

Since *Dalehite*, the Supreme Court has refined its discretionary function analysis. See *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991); *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988); *United States v. S.A. Empresa De Viacao Aerea Rio Grandense* (Varig Airlines), 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). This Court, in *Autery v. United States*, 992 F.2d 1523 (11th Cir.1993), has recently summarized the Supreme Court's analysis. To determine whether challenged government conduct falls within the discretionary function exception a court must engage in a two-part inquiry. *Id.* at 1526. First, the Court must look to the nature of the challenged conduct and consider whether the conduct involves an element of judgment or choice. *Gaubert*, 499 U.S. at ___, 111 S.Ct. at 1273; *Autery*, 992 F.2d at 1526. The exception does not apply where a federal statute or regulation "specifically prescribes a course of action for an employee to follow." *Gaubert*, 499 U.S. at ___, 111 S.Ct. at 1273. (quoting *Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1985; *Autery* 992 F.2d at 1526; see, e.g.; *Phillips v. United States*, 956 F.2d 1071, 1074-77 (11th Cir.1992) (no discretion in Army Corps of Engineers implementation of mandatory safety responsibilities); *Dickerson, Inc. v. United States*, 875 F.2d 1577, 1581-82 (11th Cir.1989) (no discretion where EPA Policies specifically prescribed course of action for waste removal). or, as this Circuit has stated the converse of this proposition, if a government official in performing his statutory duties must act without reliance upon a fixed or readily ascertainable

standard the decision he makes is discretionary and within the discretionary function exception. " Alabama Eleetric Cooperative, Inc. v. United States, 769 F.2d 1523, 1539 (11th Cir.1985) (quoting Miller v. United States, 710 F.2d 656, 663 (10th Cir); cert. denied 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed. 316 (1983)); see. e.g., Brackin v. United States, 913 F.2d 858, 860-61 (11th Cir.1990) (discretion where guidelines for reconstitution of farmland fixed no readily ascertainable standard); Hart v. United States, 894 F.2d 1539, 1546 n.8 (11th Cir), cert denied, 498 U.S. 980, 111 S.Ct. 509, 112 L.Ed.2d 521 (1990)(discretion where there were no specific mandatory guidelines for the government's identification of the remains of servicement). The relevant inquiry is whether the controlling statute or regulation mandates that a government agent perform his or her function in a specific manner, see Autery, 992 F.2d at 1538. Second, the Court must determine whether the judgment exercised is of the kind that the discretionary function exception was designed to shield. "Gaubert, 499 U.S. at ___, 111 S.Ct. at 536, 108 S.Ct. at 1959); Autery, 992 F.2d at 1526-27. By providing an exceptoin from liability for discretionary functions, Congress sought to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Gaubert, 499 U.S. at ___ S.Ct. at 2765).(quoting Varig Airlines, 467 U.S. at 814 104 S.Ct. at 2765). The Court must decide, therfore, whether the challenged actions taken by a government agent are "susceptible to policy analysis." Autery, 992 F.2d at 1531 (quoting Gaubert, 499 U.S. at ___, 111 S.Ct. at 1275). In Fisher Bros. Sales, Inc.

v. United States; 46 F.3d 279 (3rd Cir.1995); This Court stated The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, waives the federal government's sovereign immunity with respect to tort claims for money damages. The "discretionary function exception" to the FTCA limits that waiver, stating that the government retains sovereign immunity with respect to [a]ny claim...based upon the exercise or performance [of] or the failure to exercise or perform[,] a discretionary function or duty..., whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). See also; Sea-Land Service, Inc. v. U.S.A., 919 F.2d 888 (3rd Cir.1990); Gotha v. United States; 115 F.3d 176 (3rd Cir.1997).

The record show that the Plaintiff brought his complaint against the United States Government Officials at FCI McKean while acting within the scope of there employment under circumstances where the United States if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Therefore, despite the Plaintiff not naming the United States of America, in the Plaintiff First and SEcond Amended Complaint, the Plaintiff brought his complaint that the negligent or wrongful act or omission of the employee's of the government while acting within the scope of there employment and they are not immune from suit.

The Plaintiff is aware that in order for sovereign immunity to be waived, the Plaintiff must set forth material facts and show that

the discretionary function exception is non-discretionary and meet the two-prongs set out in Berkovitz and Gaubert: Infra; Also, the record show that the United States of america has been subtituted for the Government Officials at FCI Mckean and there is nonprejudice suffered.

OBJECTION (3)

The Plaintiff also ojects to the Magistrate Report and Recommendation at (1) and (3) and also at page 7 and F: THE DISCRETIONARY FUNCTION TO THE FTCA

The Magistrate Judge in it's Report and Recommendation did not address the material facts in this case. The record shows that the disxretionary function exception is not implicated in this case. See 28 U.S.C. § 2680(a) Federal Tort Claim Act. The record show in the Plaintiff's First and Second Amended Complaint, and also, in the Plaintiff's Opposition to the Defendant's Motion to Dismiss Plaintiff's Complaint, or in the Alternative, for Summary Judgment and Plaintiff's Opposition to United States Government Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment that the record and material facts show that the Defendant's has committed a non-discrectionary act pursuant to the FTCA's Discretionary Function Exception. The record show that subject matter jurisdiction has been established and sovereign immunity waived when the Defendant's

committed a non-discretionary act by violating the Warden's Regulation and Policy while acting negligently in their official capacities. The record show that Officer Wesemen did not use judgment or choice when he left the Unit unattended when the regulation implemented by the Warden specifically instructed duties to follow. See (attachment 2) (attachment 2 Wardens Declaration). The record shows that the Warden was aware that the BOP did not have a policy on how to deploy officer's in the Unit, also, the record show that the Warden James Sherman implemented his on Regulation and instruction for the Officials to follow. The record show that the Warden was aware that 28 U.S.C. § 4042 did not give instructioin to Officials to follow so the Warden implemented his own Regulation. See (attachment 2 Wardens Declaration). The Plaintiff is aware that in order to establish subject matter jurisdiction the Plaintiff must show throught material evidence that the discretionary function exception do not apply because it is a prerequisite to suit. The record show that the Warden's Declaration was violated by Officer Wesemen, and subject matter jurisdiction has been established. Therefore, 12(b)(1) does not apply at this stage of the proceeding.

The Plaintiff is aware that the Statute 18 U.S.C. § 4042 did not set forth any manner by which the BOP must fullfill this duty, and the statute set forth no particular conduct the BOP personnel should engage in or avoid while attempting to fullfill their duty to protect inmates. But, the Warden's James F. Sherman's Declaration

gave the Officers at FCI McKean responsibilities to follow and these regulations and policies was in affect on February 27, 2004, at the time of the assault, and this carelessness by Officer Wesemen, leaving tghe Unit unprotected was based on judgment or choice becasue he did not follow the instruction by the Warden and is not shieleded by the discretionary function exception because of his negligence. See (attachment 2 Wardens Declaration). The Warden's Declaration specefically gave Officer's at FCI McKean responsibilities and the Warden was aware that there was no BOP Regulartion or Policy in effect. In fact, the Warden's Declaration at page 1 and 3 states:

to my knowledge, on February 27, 2004, there was no BOP Regulation or Policy in effect which dictated the number of correctional officers, the placement of correctional officer's posts within a federal correctional institutio, or the specific duties assigned to posts within BOP Facility. The authority to determine the number, placement and specific duties of correctional officers within a BOP Facility was and continues to be a matter within the discretion of each BOP Warden during normal operations as well as during emergency situations.

See (:Plaintiff's Second Amended Complaint and Opposition to United States Motion for Summary Judgmnet and also, Plaintiff's Opposition to the Defendant's Motion to Dismiss Plaintiff's Complaint or in the Alter native, for Summary Judgment Plaintiff's Opposition to united States Government Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss, or in the Alternative Motion for Summary Judgment.

TAP NUBBLE'S

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The Plaintiff alleged and asserted that when the Plaintiff was assaulted on February 27, 2004, that the Government Official Officer Weseman, was not in the Unit at the time of the attacks taken place. See ("First and Second Amended Complaint and Plaintiff's Opposition to Defendant's First Motion for Summary Judgment").

The record show that the Warden at FCI-Mckean James F. Sherman, stated in his Declaration that:

3. To my knowledge, on February 27, 2004, there was no BOP regulation, or policy, in effect which dictated the number of correctional officers, the placement of correctional officer posts within a federal correctional or the specific duties assigned to correctional officers assigned to post within a BOP facility. The authority to determine the number, placement and specific duties of correctional officers BOP facility was and continues to be a matter within the discretion of each BOP Warden during normal operation as well as during emergency situations. See (attachment 2)

It is obvious that, the BOP did not have a regulation or policy to describe a particular duties for a correctional officer to follow and that discretion was left solely to the Warden at every BOP facility, and that the Warden at FCI-Mckean could implement the duties and responsibilities for officer's to follow during normal and emergency situations at FCI-Mckean.

The Declaration of the Warden continues to state that:

4. As the Warden at FCI-McKean in February 2004, it was my duty to determine how best to deploy correctional officers and other staff to the various posts within the compound, based upon the security needs of the institution and the effective use of limited resources.

From the above statement from the Warden, James F. Sherman, which states how ("best to deploy correctional officers and other staff to the various posts within the compound") that the Warden was placing officers based upon security needs and limited resources to each housing Unit one officer and described the duties and responsibilities that the officer was to follow because of limited resources he had available. Plaintiff note that this Declaration states that, this was implemented and still enforced on February 27, 2004, before and after the assault.

The Wardens, James F. Sherman, Declaration also states at para. 5:

5. In February 2004, it was my determination, based upon staffing levels, professional experience, and institutional needs, that one correctional officer would be posted on each side of each housing unit. This Unit Officer would be responsible for supervising the inmates inside the housing Unit by making frequent rounds through all areas of the Housing Unit, conducting safety and sanitation inspections, distributing cleaning supplies, passes out mail, and conducting cell searches and pat searches of inmates inside the Housing Unit.

The record show through the Warden James F. Sherman that the

responsibility of Officer's at each Unit was to conduct and supervise the inmates inside the Housing Unit, by faking frequent rounds through all areas of the Housing Unit, conduct safety and sanitation inspections, distributing cleaning supplies, passess out mail, and conduct cell searvhes and pat searches of inmates, inside the Housing Unit. This responsibility was for the Officers to adhere and was to be followed by the Officers in each Unit at FCI-Mckean.

The Supreme Court states in *Berkovitz*, and *Gaubert*, that:

In order forthe exception to apply, two requirements must be met. First, as its label suggest, this exception shields the government from suit only when the complained-or act is discretionary, in the sense that it "involves an elemet of judgment or choice". *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273, quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988). Thus, where a "federal statute, regulation or policy prescribes a course of action for an employee to follow" and the employee devieates from that course, his/her acts are not immune from suit. *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273, quoting *Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1958.

The Warden, James F. Sherman, gave all Officers at FCI-Mckean a regulation and policy for Officer's to follow and if they do not hadhere to the directive or deviates from that regulation or policy, the Supreme Court states that employees are not immune from suit.

The record show from the Declaration of Brian Weseman, beginning at para. 2, which states:

2. On February 27, 2004, I was assigned to the Custody Post of Evening Watch Unit Officer in Unit A at FCI McKean. This post ran from 4:00 p.m. through 12:00 a.m. As the Unit Officer, I was required to be inside Housing Unit A as well as outside of the entrance of Unit A during controlled inmate movements. As the Unit Officer, I was responsible for making security inspections inside the unit, conducting cell searches, conducting pat searches of inmates entering the housing unit, patrolling the unit, and making rounds through inmate cells, bathrooms and common areas, among other duties.

At the beginning of Officer Weseman, Declaration, it states a contradiction from the responsibilities of the Wardens, regulation and policy, because the Warden, never stated in his Declaration that ("as well as outside of Unit entrance of Unit A during controlled inmate movement"). The regulation and policy, by the Warden at FCI McKean, did not state the above and this is a non-discretionary act and the Defendant's are not shielded from suit.

Also, the Declaration of Officer Weseman states at 4 that;

4. On February 27, 2004, at approximately 8:15 p.m. I was standing outside of the entrance to Unit A monitoring inmates returning to the Unit during the last controlled inmate movement of the day in preparation for the 9:00 p.m. count. During the last inmate controlled movement inmates are permitted to return from places outside of the housing Unit, including but not limited to, the

recreation areas, the education department, the education department, the law library, psychology service, or religious service, in order to be present in their cells for the 9:00 p.m. count. During this controlled movement, I would stand outside the entrance of Unit A, and conduct random checks of inmate identification cards and pat searches of inmates entering the housing Unit.

It is obvious from the record and Declaration of Officer Weseman, that the responsibilities and discretion was abused from the regulation and policies, that the Warden, instructed Officer's to follow, and the action taken by Officer Weseman, is not grounded in the policy of the regulatory regime. Officer Weseman, concedes to the Plaintiff Complaint and Second Amended Complaint, because he states that he was standing outside at the time of the attacks by Latin King Gang Members. See (Plaintiff's First, and Second Amended Complaint, and the Plaintiff's Opposition to United States request for Summary Judgment).

The record show that the Warden, James F. Sherman, specifically prescribed a particular course of action and responsibility for Officer's to follow and officer's had no right of deviating from that course. See Berkovitz, which states:

The Court adopted a two-stage inquiry" First, a court must consider must consider if " a federal statute, regulation or policy, specifically prescribes a course of action for an employee to follow." 486 U.S. at 536, 108 S.Ct. at 1958. If so, " the employee has no rightful option but to the employee has no option but to adhere to the directive.

Therefore, this negligence by Officer Weseman, leaving the Unit unprotected and standing outside is a non-discretionary act and violated the Wardens, regulation, and policy, and sovereign immunity is waived because the Defendant's profomed duties was a non-discretionary act by not following the responsibilities which the Warden instructed Officer's to follow, and the Plaintiff has sustained present and future injuries as a result of this non-discretionary act by the defendant's. See (Plaintiff First and Second Amended Complaint and Opposition to United States Motion for Summary Judgment).

Also, by the Defendant Officer Weseman, negligence carelessness by leaving the Unit unprotected, the law states in Coulthurst v. United States, 214 F.3d 106 (3rd Cir.2000); under various fair readings of the complaint, this case similarly involves negligence unrelated to any plausible policy objectives. An inspector's decision (motivated simply by laziness) to take a smoke break rather than inspect the machines, or an absent minded or lazy failure to notify the appropriate authorities upon noticing the damaged cable, are examples of negligence fairly encompassed by the allegation of the complaint that do not involve "considerations of public policy." Gaubert, 499 U.S. at 323, 111 S.Ct. 1267. Such actions do not reflect the kind of consideration judgment "grounded in social, economic, and political policy" which the DFE is intended to shield from "judicial second-guessing." United States v. Varig Airlines, 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). If the Plaintiff can establish that negligence of this sort occurred, his claims are not barred by the DFE, and he is entitled to recover under the FTCA.

The above states that it was the Warden who determines how to deploy Officer's and where to place them in the Housing Unit, and also, the responsibilities to follow. Therefore, the Warden was aware that 18 U.S.C. § 4042 did not provide a direct manner in which the BOP Staff was to carry out there duties, so, the Warden James F. Sherman, implemented this own regulation and policies and gave responsibilities, for officers to follow and they had no alternative but to follow that directive, and adhere to it. See Gaubert, 499 U.S. 315, 325, 111 S.Ct. 1267. Officer Wesemen, violated these regulations and policies when he was outside from 8:15 to 9:00 p.m., when the Plaintiff was assaulted and Officer Wesemen, performed a non-discretionary act and is not shielded from suit be the Plaintiff, because it was not absed on a element of judgment of choice. and Officer Wesemen is not shielded by the FTCA discretionary function exception.

Wherefore, the Plaintiff request that this Honorable Court examine the material facts and attachments, and affidavits, because the affidavits that was submitted states that the inmates saw that Officer Wesemen, was not in the Unit when the Plaintiff was assaulted in this case and this Honorable Court will agree that sovereign immunity and subject matter jurisdiction has been waived and the Defendant's has committed a non-discretionary act and the discretionary function exceptioi does not apply in this case. Also,, in Cohen v. United States, 151 F.3d 1338 (11th Cir.1998); The Court stated where Congress has granted an agency discretion in implementing a

regulatory statute, the Agency's promulgation of regulation or guidelines describing how it will use that discretion is protected by the discretionary function exception. See *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1274. Furthermore, if the regulation or guidelines mandates particular conduct, and the [agency's] employee obey's the discretion, the Government will be protected [by the discretionary function exception] because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation [or guideline.]" *Id.* at 324, 111 S.Ct. at 1274, on the other hand, "[i]f the employee violateds the mandartory regulation [or guideline] there will be no shelter from liability because there is no room for choice and the action will be contary to policy. The record show that the Warden implemented his on regulation and policy and Officer Wesemen, did not follow it by leaving the Unit unattended. In Palay v. United States, 349 F.3d 418 (7th Cir.2005); the Court cited *Coulthurst*, 214 F.3d at 109, which stated:

as in *Coulthurst*, it is easy to imagine a scernario in ehich MCC Officials behaved in a negligent fashion, but without making the types of discretionary judgments that statutory exception was intended to exempt from liability. Perhaps the correction officer monitoring the holdover Unit at the time that the gang altercation broke out was simply asleep, for example, or perhaps he left the Unit unattended in order to injoy a cigarette or a snack.

That type of carelessness would not be covered bythe discretionary function exception, as it involves no element of choice or judgment

grounded in public policy considerations. Coulthurst, 214 F.3d at 109-10; Santana-Rosa supra, 335 F.3d at 45 (discussing United States v. Muniz, supra, 374 U.S. at 152, 83 S.Ct. at 1852); see also Gaubert, 499 U.S. at 325, n.7, 111 S.Ct. at 1275, n.7 In bact, in Coulthurst v. United States, 214 F.3d 106 (nd Cir.2000); the Court stated:

under various fair readings of the complaint, this case similarly involves negligence unrelated to any plausible policy objectives. An inspector's decision (motivated simply by laziness) to take a smoke break rather than inspect the machines, or an absent-minded or lazy failure to notify the appropriate authorities upon noticing the damaged cable, are examples of negligence fairly encompassed by the allegations of the complaint that do not involve "consideratoins of public policy", Gaubert, 499 U.S. at 323 111 S.Ct. 1267.

Such action do not reflect the kind of considered judgment "grounded in social, economic, and polictical policy" which the DFE is intended to sheild from" judicial second-gussing." United States v. Varig Airlines, 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). If the Plaintiff can establish that negligence of this sort occurred his claims are not barred by the DFE, and he is entitled to recover under the FTCA.

From the above law, the Plaintiff's record show that the Warden implemented a Regulation and Policy based on his knowledge that the BOP did not have one. See (attachment 2 Warden's Declaration). The Plaintiff's records show that based on Officer Wesemen Declaration he conceded that he was not in the Housing Unit when the Plaintiff was assaulted and Officer Wesemen was out of the Housing Unit

for one hour. The record of the Warden instructed the responsibilities of all Officer's conduct was to be performed insided the Housing Unit and there is no-where in the Warden's Declaration that states perform duties and responsibilities outside of the Housing Unit. See (attachment 2 Warden's Declaration). Wherefore, by Officer Wesemen leaving the Housning Unit unattended he is not sheilded by the discretionary function exception.

OBJECTION (4)

The Magistrate Judge's Report and Recommendation states at page 1 and page 10:

- (1) the motion for summary judgment as to the medical negligence claim should be dismiss without prejudice

at 10:

- G. because Plaintiff is an incarcerated pro-se litigant, he has no opportunity to offer an expert witness in opposition to the pending motion for summary judgment. In the interest fairness and because this Court is bound by the dictates of Haines v. Kerner and its progeny, this Court will see counsel to represent Plaintiff. The Government's motion for summary judgment should be dismissed without prejudice at this stage of the proceedings.

The Plaintiff agree's with the Magistrate Judge that a expert witness is needed to prove that the Defendant's neglegent act's caused the Palintiff injuries and also, the material facts will prove from the medical documents that the Plaintiff received a

past and present and future injury and the Defendant's negligent acts were foreseeable through causation. The record show that the Plaintiff sustained a permanent injury from the delay of the Defendant's negligent acts and a expert witness will testify with a medical certainty to the medical facts of this delay and negligence that the Defendant's are foreseeable for these acts and the way medical staff treated the Plaintiff. See (attachment 3 medical document's), and also, the Plaintiff's First and Second Amended Complaint, and also, Plaintiff's Opposition to the Defendant's Motion to Dismiss Plaintiff, Complaint, or in the Alternative for Summary Judgment, Plaintiff Opposition to United States Government Memorandum of Law in Support of Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment.

In Palay, v. United States, 349 F.3d 418 (7th Cir.2003); the Court stated that, it is a basic rule of tort law that the original tortfeasor is responsible not only for the injury directly resulting from the tort but also for aggravation of that injury caused by negligence in the medical treatment occasioned by the injury, e.g., Selbe v. United States, 130 F.3d 1265, 1267 (7th Cir.1997); Brownell v. Figel, 950 F.2d 1285, 1294 (7th Cir.1991); Gertz v. Campbell, 55 Ill. 2s 84. 302 N.E.2d 40, 43 (1973). So, in the event that Palay prevails on either of his other claims, he would be entitled to damages for both his original injuries and any aggravation of those injuries resulting from the manner in which the preson's medical staff treated him.

OBJECTION (5)

The Magistrate Judges Report and Recommendation state at page 1 and page 11:

- (1) the motion to dismiss should be granted as to the Plaintiff's request for punitive damages and Plaintiff's demand for a jury trial.

H. Punitive Damages and Request for Jury Trial
Plaintiff's demand for punitive damages as well as his request for trial by jury are precluded by the FTCA. 28 U.S.C. § 28 U.S.C. § 2674 ("the United States...shall not be liable ...for punitive damages."); 28 U.S.C. § 2402. Therefore, both should be dismissed.

The Plaintiff acknowledge that in the Plaintiff's First and Second Amended Complaint that the Plaintiff raised:

- A. negligence of the Medical Department Defendant's and being the proximate cause of the Plaintiff's injuries.
- B. Plaintiff's demanded for a Trial by Jury or a Bench Trial by this Honorable Court.
- C. Award the Plaintiff money damages against the Federal Agency or the Defendant's United States and Government Officials.
- D. Award the Plaintiff compensatory damages against the Defendant's Government Officials and the claim submitted to the Federal Agency. see (attachment 1)

If this Honorable Court GRANT'S the Defendant's Motion to Dismiss on punitive grounds and deny a jury trial, the Plaintiff request a Bench Trial and award the Plaintiff the damages against the Federal Agency pursuant to 1346(b) and 28 U.S.C. 2674-2680. And also, a mount for damages for compensatory damages, and for the negligent acts for proximate cause, and whatever is fair and just for the present and future and permanent injuries the Plaintiff sustained.

CONCLUSION

(1) The Plaintiff request that this Honorable Court GRANT a Bench Trial because the Plaintiff record demonstrate in this case and show that Officer Wesemen, vilated the Regulation that was implemented by the Warden and subject matter jurisdiction has been established, and the Medical Department negligent acts are the proximate cause of the Plaintiff injuries and these negligent acts are foreseeable to the medical defendants.

(2) The record show that the Warden was aware that the BOP pursuant to Title 18 § 4042 did not have procedures for EOP Officials to follow, so the Warden implemented his own Regulation for Officer's responsibilities.

(3) That subject matter jurisdiction, has been established by Officer Wesemen, leaving the Housing Unit and violating the Warden's Regulations and the responsibilities implemented by the Warden.

(4) Sovereign Immunity has been waived pursuant to the FTCA when Officer Wesemen did not follow the instruction and responsibilities that was implemented by the Warden.

(5) The Affidavits and medical records, and documents show that there is a material fact exist for this Honorable Court to GRANT a Bench Trial in this case.

(6) The Plaintiff requested in his First and Second Amended

Complaint:

- A. Award the Plaintiff damages against the Negligence of the Medical Department Defendant's for being the proximate cause of the Plaintiff's injuries.
- B. Award the Plaintiff a Jury Trial or a Bench Trial for past, present, and future damages the Plaintiff sustained at the negligence of the Government Officials.
- C. Award the Plaintiff money damages against the federal agency or the Defendant's United States of America and Government Officials for the negligent acts of the the Defendant's.
- D. Award the Plaintiff compensatory damages against the Defendant's Government Officials.

(7) That the Discretionary function exception does not apply because Officer Wesemen violated the responsibilities and the Regulations implemented by the Warden.

(8) The Defendant's Medical Department are proximate cause of the Plaintiff past, and present and future injuries.

(9) Award the Plaintiff what's fair and just for the past, and present and future and permanent injury the Plaintiff sustained from the negligence of the Government Officials.

Respectfully submitted

BY: _____

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